No. 82-1787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Office-Supreme Court, U.S.
FILED
MAY 23 19
ALEXANDER L. STEVAS,
CLERK

THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAY GREENFIELD
(Counsel of Record)
345 Park Avenue
New York, New York 10154
(212) 644-8124

JACK E. BROWN
222 North Central Avenue
Phoenix, Arizona 85004
(602) 257-8777

Attorneys for Petitioner

CAREY R. RAMOS
DOROTHY E. ROBERTS
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
A partnership including professional corporations

LAWRENCE G. D. SCARBOROUGH
BROWN & BAIN, P.A.

Of Counsel

TABLE OF CONTENTS

	PAGE
ARGUMENT	1
I. The Questions Presented	1
II. *Buckingham's* Relationship to *Monsanto*	3
III. Reviewability of the *Per Se* Rule	4
CONCLUSION	5

TABLE OF AUTHORITIES

Cases	PAGE
Bostick Oil Co. v. *Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶ 65,271 (4th Cir. 1983)	3
Carlson v. *Green*, 446 U.S. 14 (1980)	4
Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977)	3
Cuyler v. *Sullivan*, 446 U.S. 335 (1980)	4
Dr. Miles Medical Co. v. *John D. Park & Sons*, 220 U.S. 373 (1911)	2, 4
Monsanto Company v. *Spray-Rite Service Corporation*, No. 82-914 (*cert. granted* Feb. 28, 1983)	*passim*
Oreck Corp. v. *Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981)	4
Schwimmer v. *Sony Corp. of America*, 677 F.2d 946 (2d Cir.), *cert. denied*, 103 S. Ct. 362 (1982)	3
United States v. *Container Corporation of America*, 393 U.S. 333 (1969)	2
Youakim v. *Miller*, 425 U.S. 231 (1976)	4

No. 82-1787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE BUCKINGHAM CORPORATION,[1]

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I.

The Questions Presented

Respondent attempts to characterize this case as one presenting only an issue of fact: "Did the court of appeals err in holding that there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict?" (Br. in Opp. i) If that were all that is at issue in

1 Petitioner's parent and affiliates are listed on pages iii and 1a-7a of the petition.

termination cases like this, we doubt that the Court would have granted certiorari in *Monsanto Company* v. *Spray-Rite Service Corporation*, No. 82-914 (*cert. granted* Feb. 28, 1983). As in *Monsanto*, the fundamental question presented for review here is the standard the courts should apply in determining whether there is sufficient evidence to infer a conspiracy to fix prices. This issue is the subject of confusion among the circuits and its resolution will have a far reaching effect on competition.

Buckingham, even more powerfully than *Monsanto*, demonstrates the consequences of applying a lenient and imprecise standard for inferring a price fixing conspiracy in a vertical context. Under *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U.S. 373 (1911), once a conspiracy is inferred, the court must apply the *per se* rule. This conjunction of the easy inferrence of concerted action with the *per se* rule permits a drastic result in cases like *Buckingham:* the leap from routine inquiries between a supplier and its wholesalers about a price cut to treble damage exposure if a wholesaler is terminated even for procompetitive reasons.[2]

The standard for inferring a *per se* unlawful price-fixing conspiracy cannot be simply transported from horizontal to vertical cases as Odom suggests (Br. in Opp. 8-9) without subverting the intent of the antitrust laws. Since in horizontal relationships there are rarely legitimate reasons for competitors to communicate about price, *United States* v. *Container Corporation of America*, 393 U.S. 333 (1969), it is consistent with antitrust policy to combine the easy inference of concerted action with the *per se* rule in such cases. In vertical relationships, on the other hand, dialogue between suppliers and wholesalers—far from having a "pernicious effect on competi-

---

2 Respondent's adversarial summary of the evidence (Br. in Opp. 2-5) shows that there were no threats and no suggestions for future pricing. If the conversations which took place can permit a finding of antitrust conspiracy, any discussion between a supplier and a wholesaler concerning resale price, no matter how innocuous, could be the basis of a treble damage verdict and injunction against a procompetitive termination.

tion" or lacking "any redeeming [competitive] virtue," *Continental T.V., Inc.* v. *GTE Sylvania Inc.* 433 U.S. 36, 49-50 (1977)—is necessary to the maintenance of efficient systems of distribution. *Buckingham* demonstrates that the easy transition from such communications to *per se* illegality in vertical cases may actually promote anticompetitive behavior since dialogue will be chilled and suppliers will often choose to preserve an inefficient status quo.

Respondent attempts to resolve the supplier's dilemma created by the Ninth Circuit's decision with a simplistic statement: "Had petitioner not engaged in actions which permitted the reasonable inference of concerted action, it would have been free to terminate either wholesaler without fear of antitrust liability." (Br. in Opp. 13) This merely begs the ultimate question of what conduct warrants an inference of *per se* illegality. Moreover, it demonstrates the harsh result in *Buckingham*. As long as there are complaints and inquiries concerning a price cut, suppliers are not free to terminate the wholesaler—even where termination permits the supplier to compete more effectively.

II.

Buckingham's Relationship to *Monsanto*

Respondent's attempt to distance this case from *Monsanto* requires little response. Respondent ultimately acknowledges that *Monsanto* invites the Court to reach the fundamental legal issue: "the degree of evidence required to infer concerted action." (Br. in Opp. 16) This is precisely the issue presented here in a context more typical of events in the market place.[3]

---

3 Contrary to respondent's assertion (Br. in Opp. 15 n. 15), the petition cited numerous cases which involved communications between the supplier and one or more of its wholesalers, as well as complaints and internal discussions. *See, e.g., Bostick Oil Co.* v. *Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶ 65,271, at 69,594 (4th Cir. 1983) (supplier's vice president directed sales manager to talk to plaintiff regarding complaints); *Schwimmer* v. *Sony Corp. of America*, 677

III.

Reviewability of the *Per Se* Rule

Finally, respondent attempts unreasonably to restrict the Court's discretion to review the applicability of the *per se* rule to procompetitive conduct in vertical price-fixing cases. This Court has acknowledged in numerous cases its discretion to consider issues not raised in the court of appeals. *See, e.g., Youakim* v. *Miller,* 425 U.S. 231 (1976) and cases cited therein.

Buckingham argued in the district court that its termination of respondent should be evaluated under the rule of reason (Buckingham's Trial Memorandum 24-29); since the district court granted Buckingham's motion for a directed verdict, Buckingham had no need to make this argument in the Court of Appeals.

The Department of Justice has already asked the Court in *Monsanto* to reconsider the rationale of *Dr. Miles Medical Co.* v. *John D . Park & Sons,* 220 U.S. 373 (1911). *See* Pet. 17 n. 21. A formality should not prevent the Court from addressing this "important, recurring issue", *see Carlson* v. *Green,* 446 U.S. 14, 17 n.2 (1980), in the context of the *Buckingham* record—a record which, unlike the *Monsanto* record, involves a termination with clear procompetitive benefits.

Moreover, since the *per se* rule is inextricably tied to the standard for inferring concerted action in vertical price-fixing cases, "resolution of this question of law is a 'predicate to an intelligent resolution' " of the other questions presented. *See Cuyler* v. *Sullivan,* 446 U.S. 335, 342 n.6 (1980) (citation omitted).

F.2d 946, 948 (2d Cir.), *cert. denied,* 103 S. Ct. 362 (1982) (supplier's vice president told complaining distributor that there would be changes to reduce price cutting); *Oreck Corp.* v. *Whirlpool Corp.,* 639 F.2d 75, 80 (2d Cir. 1980), cert. denied, 454 U.S. 1083 (1981) (supplier's salesman told plaintiff about other retailers' disapproval of plaintiff's advertisements).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted and set down for argument in tandem with *Monsanto*. In the alternative, the Court should hold consideration of the petition until a decision has been rendered in *Monsanto*.

Dated: May 23, 1983

Respectfully submitted,

JAY GREENFIELD
(Counsel of Record)
345 Park Avenue
New York, New York 10154
(212) 644-8124

JACK E. BROWN
222 North Central Avenue
Phoenix, Arizona 85004
(602) 257-8777

Attorneys for Petitioner

CAREY R. RAMOS
DOROTHY E. ROBERTS
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
A partnership including professional corporations

LAWRENCE G. D. SCARBOROUGH
BROWN & BAIN, P.A.

Of Counsel

(THIS PAGE INTENTIONALLY LEFT BLANK)